Supreme Court, U.S.
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No. 99-874

IN THE
Supreme Court of the United States

GIAO NGUYEN,

Petitioner,

v.

INOVA ALEXANDRIA HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Where the circuit courts are in agreement that receipt of an EEOC right-to-sue letter by someone other than the complainant in appropriate circumstances can start the running of the 90-day period for filing suit under Title VII of the Civil Rights Act, and where no court has held that a neighbor designated by the complainant to receive her mail in her absence cannot be an agent of the complainant for purposes of receiving a right-to-sue letter, should this Court review the Fourth Circuit's decision holding that a neighbor designated by the complainant to pick up her mail and hold it safe is complainant's agent for purposes of receipt of the EEOC's right-to-sue letter?

2. Where the circuit courts are in general agreement that, in a constructive receipt case, if it is uncertain when an EEOC right-to-sue letter is received, the 90-day period for filing suit begins to run three days after the EEOC mails the letter, and the Fourth Circuit followed that rule here, is review by this Court warranted?

3. Where Petitioner's equitable tolling analysis depends on a review of the unique circumstances of this case, including that Petitioner had the early advice of an attorney and could have filed suit long before the deadline, is this fact-specific case appropriate for review by this Court?

STATEMENT PURSUANT TO RULE 29.6

Inova Alexandria Hospital is a division of Inova Health System. Neither Inova Alexandria Hospital nor Inova Health System is a publicly held corporation, and no publicly held company owns 10% or more of the stock of Inova Health System or Inova Alexandria Hospital.

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STATEMENT OF THE CASE

A. Procedural Background And Facts

Respondent adopts the statement of the facts and procedure in the opinion below (Pet. App. 2a-6a) with the following additions.

1. Reasons For The Discharge

Respondent Inova Alexandria Hospital ("the Hospital") discharged Petitioner Giao Nguyen for two reasons. First, on May 22, 1996, without prior authorization, and contrary to the specific directives of the attending cardiologist, Dr. Castro, Nguyen substantially increased the dosage of Dobutamine to a critically ill, 82 year-old ICU heart patient. (A.E. 119, 202, 206, 208-11, 212, 414-15). As a result of Nguyen's unilateral increase in the drug's dosage, the patient developed an abnormally rapid pulse and a heart rate of between 120 to 130 beats per minute. *Id.* at 406, 412, 414-15. This elevated heart rate placed the patient in a life-threatening situation. A.E. 418. In a letter to the Hospital, Dr. Castro requested that Nguyen never again care for his patients. *Id.* at 404-08, 421.

Second, six days later, on May 28, 1996, during the 11:00 p.m. to 7:00 a.m. shift, Nguyen was responsible for caring for two ICU isolation patients in ICU rooms 7 and 8.[1] (A.E. 225-27). During Nguyen's shift, other ICU nurses

1. An ICU patient is put in "isolation" when the patient has a contagious condition that requires him to be kept separate from other patients. (A.E. 227) One of the patients assigned to Nguyen while she was "resting" was on a ventilator, a machine that assists breathing. *Id.* at 318.

heard alarms from Nguyen's patients and, not being able to locate Nguyen, answered the alarms. *Id.* at 318-19. After more than one hour of not being able to locate Nguyen, Nursing Supervisor Anne Vispo ("Vispo") found Nguyen "resting" under a blanket in a reclining chair in ICU Patient Room No. 1, across from ICU Rooms 7 and 8 and out of sight of her patients.[2] *Id.* at 228, 230, 236-37, 425.

In her deposition, Nguyen acknowledged that, while she was "resting" in ICU Room No. 1 with a blanket over her, the doors were closed to ICU Rooms 7 and 8 across the hall containing her two patients. (A.E. 238). Nguyen took the position that she "probably" could have heard her patients, one of whom was on a ventilator, if they had called out in distress while Nguyen was "resting" across the hall. *Id.* at 239.

On May 31, 1996, ICU Supervisor Deborah Capron counseled Nguyen about abandoning her patients and about the Dobutamine incident. (A.E. 313-14, 317-18). With respect to her unilateral increase in the Dobutamine dosage, Nguyen took the position that she had done nothing wrong and had in fact saved the patient's life. *Id.* at 313. Nguyen denied any culpability with respect to neglecting the two "ICU isolation" patients. *Id.* at 238. After an investigation of this incident by Capron and Hospital Director of Human Resources Coleen Collins, the Hospital determined that Nguyen had abandoned her patients and that this conduct,

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2. Nguyen's choice of Patient Room No. 1 for a "rest" was particularly confounding because the Hospital has a cafeteria, a conference room, a nurse's report room and a vending machine room available for breaks. (A.E. 320-21, 383). Moreover, there is an "overabundance" of chairs in the public area of the ICU for nurses to sit down and rest. *Id.* at 384-85.

together with her refusal to follow the doctor's orders regarding administration of medication, necessitated her discharge. *Id.* at 316-17, 332-33, 361-67, 371-72, 391-92.

2. Receipt Of The Right To Sue Letter

Nguyen testified at her deposition that she had called the EEOC about when a decision would be made on her charge and was told that she would hear from them "within about six months" of the time in February 1997 that the charge was filed. (A.E. 169-70). Nguyen testified that she did not know the exact date the EEOC's Notice of Right-to-Sue letter arrived at her house, but admitted that it arrived at her mailbox by regular mail during the time she was on vacation in Ocean City, Maryland between August 22, 1997[3] and September 1, 1997.[4] *Id.* 168-72, 240-242. Nguyen stated that the last day she picked up her mail before her vacation was August 21, and that she did not "recall" seeing the EEOC's Right-to-Sue letter on that day. *Id.* at 161-62. Before Nguyen went on vacation, she instructed Kathy and Kurt Thompson, her neighbors who lived in the same cul-de-sac, to pick up her mail and keep it safe and secure until she returned on September 1, 1997. *Id.* at 162-64. She also gave her neighbors a telephone number where she could be reached

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3. Contrary to Petitioner's statement of the facts (Pet. 3), Nguyen testified that she did not actually leave her home on August 22; she "went out" and celebrated her birthday on that date, but did not pick up her mail. (A.E. 160). She actually left for Ocean City on August 23. *Id.*

4. Although Nguyen testified at her deposition that she was in possession of the envelope from the EEOC, she failed to produce that envelope when requested in discovery. (A.E. 164).

while on vacation. *Id.* at 166-67. She testified that the Thompsons "rarely" called unless something happened to Nguyen's house. *Id.* at 167. Nguyen testified that her neighbors picked up her mail on other occasions when Nguyen was away, and that she had "no question" that her neighbors would keep her mail "safe and secure" until her and her husband's return. *Id* at 163.

Nguyen returned from her vacation late in the night of August 31 to September 1. (A.E. 164). Kathy Thompson averred that she gave the accumulated mail to Nguyen's husband on Monday, September 1, which was Labor Day *Id.* at 804. Nguyen recalled opening the EEOC's Right-to-Sue letter on September 2. *Id.* at 166. She did not know what day the Thompsons retrieved the EEOC's letter or whether the Thompsons checked for specific mail. *Id.* at 168.

3. Nguyen's Contact With An EEOC Case Worker And Supervisor After Nguyen's Receipt Of The Right-To-Sue Letter

Nguyen averred that at an unspecified time she called the EEOC Washington Field Office and asked "given this situation, when my complaint must be filed." (July 6, 1998 Affidavit of Giao Nguyen attached as Exhibit D to Plaintiff's Memorandum of Points And Authorities In Support of Plaintiff's Rule 56(e) Motion, at p. 3, ¶ 11). Nguyen's affidavit states: "The reply of the case-worker and the supervisor was that it would be due 90 days after I received it, regardless of what the date on the letter is. They informed me that it would be up to me to establish when I received it." The affidavit does not reveal whether Nguyen told the EEOC employees about her neighbors being designated by her to receive her mail or about any of the other circumstances surrounding receipt of the EEOC right-to-sue letter.

B. The Court Of Appeals' Decision

In its unpublished decision the court of appeals characterized the principal issue in this case as: ". . . whether delivery of a notice of right-to-sue letter to a claimant's home, where it is picked up by a delegated neighbor, is effective notice of the claimant's judicial rights." (Pet. App. 66). The court then observed that, where someone other than the claimant first received the right-to-sue letter, the court has engaged in a case-by-case examination to determine if an equitable tolling of the filing period is appropriate. (Pet. App. 7a). The court of appeals also noted that where the actual date of receipt of the EEOC notice is confirmed by evidence, that date governs. *Id.* If, however, the date is unknown, the court will presume, in accordance with Rule 6(e), F. R. Civ. P., that where there is service by regular mail, the letter was received within three days. *Id.*

The court of appeals found that in this case the limitations period began to run when the Notice of Right-to-Sue was delivered to Nguyen's home *and picked up by a designated neighbor.*" (Pet. App. 8a). (Emphasis added). Because it was not certain when this actually occurred, the court of appeals applied the three-day presumption in Rule 6(e), finding that the limitations period expired on November 21, 1997. *Id.* at 8a.

The court of appeals then turned to the question whether the case presented equitable considerations that were sufficient to support tolling of the statute. (Pet. App. 8a). The court of appeals noted that after Nguyen delegated to her neighbors the job of picking up her mail while her family was on vacation, the neighbors acted as Nguyen's agent when they collected the Notice of Right-to-Sue and all other mail

delivered to Nguyen's house between August 22, 1997 and September 1, 1997. *Id.* The court of appeals here distinguished its decision in *Ish v. Arlington County, Virginia*, 918 F.2d 955, 1990 WL180127, *1 (4th Cir. Nov. 21, 1990) (unpublished) permitting equitable tolling where a claimant's landlord's receptionist, who had received the Notice of Right-to-Sue, had not been designated by the claimant to collect claimant's mail. *Id.*

The court of appeals rejected Nguyen's arguments for equitable tolling, noting that: (1) on September 2, when Nguyen opened the EEOC's letter, she still had 85 days to file her suit; (2) when on September 26 she received the EEOC's administrative file she still had 56 days to file her suit; and (3) that the Hospital did not induce Nguyen to sleep on her rights. *Id.* at 9a-10a Accordingly, the court of appeals found that Nguyen's lawsuit was time-barred. *Id.* at 11a.

REASONS FOR DENYING THE WRIT

The court of appeals' decision in this case turns on its finding that Nguyen's neighbors, whom she directed to pick up and hold her mail, were her agents for purposes of her receipt of the EEOC right-to-sue letter and the beginning of the running of the 90-day period in which she could file her lawsuit. No other circuit court is in disagreement with that holding. Thus, no circuit court requires receipt of the EEOC Right-to-Sue letter by the charging party and no other person in all circumstances to start the running of the 90-day period. There is general agreement by the circuit courts and by the EEOC that there can be constructive notice to the complainant when the EEOC's right-to-sue letter is received by someone other than plaintiff, if the circumstances warrant such a finding. No circuit court has held that a neighbor,

specifically designated by the complainant to receive the complainant's mail in her absence, cannot stand in the complainant's shoes for purposes of receipt of the notice and the running of the 90-day period. In fact, this appears to be the first time the question of whether receipt of the Right-to-Sue letter by a neighbor designated by the complainant to pick up and retain her mail is sufficient to start the running of the 90-day period. The issue is not a recurring one and not of importance in the administration of the statute. The court of appeals, in any event, was correct in finding that Nguyen's neighbors were her agents for purposes of receipt of the EEOC right-to-sue letter where she specifically designated them to pick up her mail and could have communicated with them concerning return addresses on the envelopes.

Also without merit is Petitioner's contention that in this case the Fourth Circuit diverged from other circuits in applying a presumption that the EEOC notice was received within three days of the date on the letter where the actual day of receipt was not ascertainable. Petitioner's argument is premised on the incorrect assumption that the EEOC notice was not "received" until the day Nguyen opened the EEOC letter, a date which was ascertainable. In fact, for purposes of running the statute of limitations, the letter was "received" by Nguyen's agents, her neighbors, on an unknown day in the period August 22 – August 31. Where, as here, the date of the agent's receipt is unknown, the circuit courts generally apply a presumption that the letter was received by the complainant within three days of the date on the letter or within three days of its postmark. That is an entirely reasonable presumption, and Petitioner has suggested no other. Accordingly, the Fourth Circuit's presumption that Nguyen's neighbors received the EEOC's letter three days after the date on the letter does not warrant review by this Court.

Petitioner's argument that the court of appeals erred in not applying equitable tolling principles, if accepted, will require this Court to analyze the unique factual circumstances of this case, a task best left to the district court and court of appeals. In any event, despite that she had early legal advice, Nguyen sat on her hands, permitting the lengthy time she had remaining to fritter away. She was not misled or delayed by the EEOC or anyone else. The court of appeals rightly concluded that her suit was time-barred.

I. There Is No Split In The Circuits On The Question Whether A Complainant Can Be Charged With Receipt Of The EEOC Notice By A Neighbor Where She Specifically Designates The Neighbor To Recover And Hold Her Mail

The Fourth Circuit held in this case that when the Notice of Right to Sue was delivered to Nguyen's home *and* picked up by a designated neighbor the limitations period began to run. Pet. App. 8a. Thus, the Fourth Circuit found that Nguyen's "neighbors acted as Nguyen's agent" for purposes of receipt of the EEOC letter. *Id.* at 8a; *see* Pet. App. 10a. That holding is not contrary to the decision of any circuit court and is based on accepted principles of agency law as well as sound equitable considerations.

Petitioner acknowledges that there is "near uniformity" in the circuit courts that, for purposes of the running of the statute of limitations, a complainant can be charged with constructive receipt by someone other than the complainant. (Pet. 22). The EEOC is in agreement with this view. Brief for the Equal Employment Opportunity Commission As Amicus Curiae in *Giao Nguyen v. Inova Alexandria Hospital* (4th Cir. No. 98-221 (1999)) at 10. Petitioner argues, however,

that the cases finding constructive receipt by someone other than the complainant are limited to the complainant's family members and attorneys. Petitioner contends that the constructive receipt rule should not be extended to neighbors. (Pet. 22-23)

Petitioner is right that the circuit courts uniformly permit satisfaction of the notice requirement based on receipt of the right-to-sue letter by a family member or the complainant's attorney in circumstances where the letter was delivered to the address designated by the complainant. The exceptions involve situations where the complainant, through no fault of her own, failed to receive the right-to-sue letter, or where there was some other equitable reason for tolling the statute until the complainant actually received the letter. *See, e.g., Espinoza v. Missouri Pacific Railroad Co.*, 754 F.2d 1247, 1249-51 (5th Cir. 1985) (where wife received letter while complainant was out of town and did not return for eight days, receipt by complainant's wife started the running of the statute); *Bell v. Eagle Motor Lines*, 693 F.2d 1086 (11th Cir. 1982) (receipt by complainant's wife started running of the statute); *Law v. Hercules*, 713 F.2d 691 (11th Cir. 1983) (90-day period began to run when complainant's son picked up the EEOC letter at the post office, not when it was seen by the complainant one or two days later); *Mahoney v. United States Postal Service*, 884 F.2d 1194, 1197 (9th Cir. 1989) (receipt of EEOC letter by former attorney starts running of limitations period where complainant never informed EEOC she would no longer be using that attorney for her case); *Josiah-Faedwor v. Communications Satellite Corp.*, 785 F.2d 344, 346-47 (D.C. Cir. 1986) (notice of right-to-sue imputed to complainant where attorney received the right-to-sue letter and complainant failed to inform EEOC of her address

change); *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1314 (7th Cir. 1984) (attorney's receipt of right-to-sue letter starts the running of the limitations period); *Scholar v. Pacific Bell*, 963 F.2d 264, 267-68 (9th Cir. 1992) (receipt of right-to-sue letter by complainant's daughter at complainant's residence sufficient to start running of the limitation period); *Mosel v. Hill's Department Store, Inc.*, 789 F.2d 251 (3rd Cir. 1986) (receipt of right-to-sue letter by complainant's attorney starts the running of the limitation period). *St. Louis v. Alverno College*, 744 F.2d 1314, 1315 (7th Cir. 1984) (complainant who failed to advise EEOC that he had moved charged with constructive receipt at old address); *Million v. Frank*, 47 F.3d 385, 388 (10th Cir. 1995) (receipt by member of complaint's household sufficient to start running of the limitations period).

There are also circuit court cases holding that the running of the limitations period starts on the date that the EEOC letter was received at the complainant's attorney's office, even though it was not actually received by the complainant's attorney until later. *See Ringgold v. National Maintenance Corp.*, 796 F.2d 769 (5th Cir. 1986); *Josiah-Faedwor v. Communications Satellite Corp.*; *supra*, 785 F.2d at 345.

There is no split in the circuits on the issue decided in this case and the question is not one of importance in the administration of the statute. No circuit court has held that there can never be constructive receipt of the right-to-sue letter by someone other than complainant's family member or attorney. In fact, our research shows that this is the first case in which a circuit court has addressed the question of the effectiveness of the receipt of the right-to-sue letter by a designated neighbor. Thus, there is no conflict in the circuits. Indeed, since the Fourth Circuit's decision in this case is unpublished, it will not cite the case in the absence of unusual circumstances. Fourth Circuit Rule 36(c).

The question whether a neighbor specifically designated by the complainant to receive her mail can be the complainant's agent for purposes of receipt of the right-to-sue letter thus is not a recurring one in the administration of the statute. It is apparently unique in the decisional law. Accordingly, it is not of sufficient importance as a matter of statutory interpretation to warrant review by this Court.

In any event, the Fourth Circuit's analysis is correct. Under accepted principles of agency law, the Thompsons were Nguyen's agents for purposes of receipt of the EEOC's right-to-sue notice. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Restatement (Second) of Agency, § 1. In this case, the Petitioner gave her consent for the Thompsons to act on her behalf, subject to her instructions, and the Thompsons' consented to so act. Petitioner's contention that a neighbor of a complainant can never act as an agent with respect to receiving a right-to-sue letter ignores a basic principle of agency law: the law of agency excludes no classes of individuals from acting as agents in connection with the completion of a particular task for a principal. Restatement (Second) of Agency, § 21. Any two parties can enter into a valid agency agreement. *Id.*

As the courts of appeals correctly concluded, the parties entered into an valid agency agreement for the receipt of Petitioner's mail while Petitioner was on vacation. Before Petitioner went on vacation, she instructed the Thompsons to pick up her mail, keep it safe and secure, and return it to the Nguyens when they returned from vacation. (A. 102, 109; A.E. 162-64). The Thompsons were also given a

telephone number where they could reach the Nguyens. *Id.* The Thompsons consented to this arrangement, picked up the mail as instructed, kept it safe and secure, and provided it to Mr. Nguyen upon the Nguyens return from vacation. (A.E. 163-66). Petitioners argument that the court of appeals wrongly concluded that an agency relationship was established without the Thompsons' knowledge or consent (Pet. 23) is directly contradicted by her deposition testimony. (A.E. 163-66). In fact, the Thompsons were well aware of their responsibilities with respect to collecting and safeguarding Nguyen's mail, and consented to the arrangement. *Id.*[5]

Petitioner states that it is fair to consider as agents for purposes of receipt of the EEOC's right-to-sue letter family members and attorneys, but no others, because "it is presumed that [family members and attorneys] have ready access to the complainant to inform her of the EEOC letter and possibly have been privy to the ongoing EEOC charge process." (Pet. 23). The cases cited by Petitioner, however, do not rely on either of these factors as prerequisites for imputing receipt to the complainant. Moreover, it is undisputed that the Thompsons actually had ready access to Petitioner by telephone while she was on vacation. Nor do Petitioner's cases hold that the complainant must have specifically authorized the family member or attorney to receive her mail. By requiring, at least in the case of neighbors, that the complainant specifically designate the neighbors to receive her mail, the Fourth Circuit has actually *added* a measure of protection not present in cases involving family members.

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5. It is irrelevant that Petitioner did not provide the Thompsons with any consideration in exchange for their agreement to act as Petitioners' agents. — Consideration is not required to establish an agency relationship. *Terbovitz v. Fiscal Court of Adair Cty.*, 825 F.2d 111, 116 (6th Cir. 1987); Restatement (Second) of Agency, § 3.

Petitioner suggests that the Fourth Circuit's ruling would be no different if Nguyen had hired a teenager to bring in the mail or if Nguyen had permitted the mail to pile up in her mail box. (Pet. 24 and n.10). There is nothing in the Fourth Circuit's decision to support Nguyen's broad reading of that decision. Indeed, the court of appeals stated that it proceeds on a case-by-case analysis of these kinds of situations, finding in one case that a landlord's receptionist was not complainant's agent. (Pet. App. 7a, 20a). A minor probably could not be complainant's agent. The Fourth Circuit did not address the circumstance of someone who deliberately does not arrange for collection of her mail when she knows that she may be receiving an EEOC right-to-sue letter around that time.

Petitioners rely on the fact that Nguyen did not direct her neighbors to do anything more than collect her mail. (Pet. 23). Nguyen's omissions do not make the Thompsons any less her agent for *receipt* of her mail. Moreover, Nguyen had been told by the EEOC that she would receive an EEOC determination of her charge within six months of the time she filed it. Since the charge was filed in February she should have known that the Commission would mail its right-to-sue letter no later than the end of August. Nguyen and the Thompsons could communicate by phone. It would have been a simple matter for Nguyen to have asked the Thompsons to look out for a letter with the EEOC's return address and to call her or to overnight mail the letter to her. There would be no privacy issue here because Nguyen never instructed the Thompsons not to look at individual pieces of mail and testified at her deposition that she was unaware of whether the Thompsons did so or not.

Nguyen benefited in three ways from her designation of the Thompsons to pick up her mail as opposed to having the post office hold her mail: (1) her husband was able to retrieve the family mail on Labor Day, when the post office was closed; (2) Nguyen or her husband did not have to wait in line at the post office on September 2; and (3) in collecting Nguyen's mail the Thompsons checked to ensure that all was well at Nguyen's house and reported any emergencies to her by telephone. Nguyen wanted these benefits but not the concomitant obligation to ensure that she was aware of important mail regarding filing deadlines. Like Nguyen's irresponsible behavior on her job, she now asks the Court to overlook her irresponsible behavior in not making specific provision for the Thompsons to notify her of receipt of the EEOC letter. In fact, Petitioner seeks to take advantage of her omissions in her instructions to the Thompsons to argue that she should not be charged with the Thompsons' receipt of the EEOC notice. (Pet. 23). The Court should reject Petitioner's unreasonable approach to the notice issue.

Without citation of authority, Petitioner argues that had the EEOC sent the right-to-sue letter by certified mail, as it had in the past, Nguyen's neighbors would "have had no right to obtain the EEOC notice." (Pet. 23). Petitioner has not shown, however, that a person anticipating a certified letter and knowing that she would be out of town could not have made arrangements with the post office to have a neighbor sign for the letter, including giving the neighbor written authorization to do so. In any event, Petitioner's "might have been" argument will not wash. The fact is that, as the court of appeals stressed (Pet. App. 23), the Thompsons did pick up Nguyen's mail, which included the EEOC letter. That is our case, not some hypothetical case.

Finally, Petitioner relies on the EEOC's support in its amicus brief in the court of appeals for Petitioner's argument that the constructive notice rule should not be extended to neighbors. (Pet. 24).[6] It is noteworthy, however, that the pertinent EEOC regulations do not support Petitioner's argument. The regulations at 29 C.F.R. § 1601.08(e) state:

> (e) Content of notice of right to sue. The notice of right to sue shall include:
>
> (1) Authorization to the aggrieved person to bring a civil action under Title VII or the ADA pursuant to section 706(f)(1) of Title VII or section 107 of the ADA within 90 days from receipt of such authorization.

29 C.F.R. § 1601.28 (West 1998). The EEOC offers no further definition of the meaning of "receipt," which is left ambiguous as to its scope. The EEOC's interpretation of the statute and regulations in its court of appeals amicus brief is not entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) because that interpretation is clearly the agency's litigating position, in the nature of a "post hoc rationalization," rather than the result of the official exercise of rulemaking authority. *See Martin v Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156-57 (1991).

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6. The EEOC did not file an amicus brief in support of the Petitioner in this Court.

II. Where The Circuit Courts, Including the Fourth Circuit, Are In General Agreement That If The Date Of Receipt Of The EEOC Right-To-Sue Letter Is Not Known The Court Will Presume It Was Received Within Three Days After The Date Of The Letter, There Is No Issue Warranting This Court's Review

In order to create a split in the circuits, and to place the Fourth Circuit in the minority, Petitioner has miscast the court of appeals' holding in this case. Thus, Petitioner claims that the Fourth Circuit held that "even if the complainant can prove when she first received the right-to-sue letter, the Circuit will begin the 90-day right-to-sue period three days after the date the letter issued." (Pet. 13). On the contrary, in this constructive notice case, the court of appeals denominated its holding as follows: ". . . we hold that the limitations period began to run when the Notice of Right to Sue was delivered to Nguyen's home *and picked up by a designated neighbor*." (emphasis added) (Pet. App. 8a). Since the date the Thompsons picked up the EEOC's letter was not known, the court of appeals "presumed that service by regular mail is received within three days pursuant to Rule 6(e) of the Federal Rules." *Id.* at 7a. That presumption is shared by this Court and by all the courts of appeals in cases, like this one, where the actual receipt date by the complainant is not known. *See, e.g., Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 148 (1984); *Seitzinger v. Reading Hospital and Medical Center*, 165 F.3d 236, 239 (3d Cir. 1999); *Sherlock v. Montefiore Medical Center*, 84 F.3d 522, 525-26 (2nd Cir. 1996); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 n.3 (D.C. Cir. 1998). Petitioner contends, however, that since she established that she actually first read the EEOC's right-to-sue letter on September 2, the statute of limitations began to

run on that date. (Pet. 18). But in all those cases where there was constructive receipt of the right-to-sue letter by complainant's family member or attorney (*see* pp. 9-10, *supra*) the courts of appeals did not begin the running of the statute from the later date when the complainant actually received the letter. The 90 days was computed from the date of the constructive receipt, if known, or, if not known, from a point three days after the date of the EEOC letter.

Were the Court to adopt Petitioner's approach, there could never be constructive receipt of a right-to-sue letter because a complainant could always testify as to when she actually first opened and read the letter, albeit after it was received by someone else. Under Petitioner's rule a complainant could take a six-month around-the-world trip, direct her neighbor to pick up her mail, and not have the statute of limitations run against her until she returned and actually read (or was handed) the EEOC's letter. Such a result is absurd.

Not surprisingly, Petitioner's cases (Pet. 15-21) are inapposite. None addresses the situation here where there was constructive receipt by someone other than complainant. Whatever might be the view of the respective circuits on the broader question whether delivery of the right-to-sue letter to the complainant's house or mailbox, or a post office notice that it is available for pick up, constitutes "receipt" for purposes of the statute of limitations, that is not this case. Petitioner's attempt to create a "straw man" issue should be rejected. There is no conflict in the circuits on the question in this case and no basis for review by this Court.

III. The Court Of Appeals Fact-Specific Analysis Of Whether Nguyen's Case Requires Equitable Tolling Does Not Warrant Review By This Court

In this case, the court of appeals and the district court considered and rejected Petitioner's equitable tolling argument. (Pet. App. 10a, 16a). Those determinations are well-supported in the record. The Court should reject Petitioner's invitation to re-examine the unique factual bases for the court's rejection of Petitioner's equitable tolling argument. *See United States v. Johnson*, 268 U.S. 220, 227 (1925).

The court of appeals found that it was Nguyen's own fault that she did not timely file her complaint and that there was no justification for equitable tolling. (Pet. App. 109). There is ample support for that determination. Thus, as early as September 9, Nguyen had the advice of legal counsel, and by September 26 Nguyen had obtained her EEOC file and had met with counsel. (Pet. App. 4a). While counsel told her at that meeting that she should get evidence to corroborate her position, nothing prevented her from filing her complaint after September 26, even without that corroborating evidence. As the court of appeals observed, on September 26 Nguyen still had 56 days to file her case, and her failure to do so was her own fault. (Pet. App. 109).

Nguyen contends that, unlike other circuits, the Fourth Circuit in this case ignored that she received erroneous advice from an EEOC case worker and supervisor about the filing deadline. (Pet. 26). The problem with Petitioner's argument is that it is based on premises unsupported in the record — that she consulted the EEOC employees before the November 21 filing deadline and that she informed the EEOC employees

that she had designated her neighbor to collect her mail and hold it safe. Nguyen's affidavit does not specify the date she contacted the EEOC. For all we know, it could have been after the November 21 due date or even after December 1, the date she claimed her complaint was due. If so, she could not have acted on the EEOC's advice to her detriment. Moreover, her affidavit does not state that she told the EEOC case worker or supervisor that she had designated her neighbors to pick up and hold her mail. Thus, it is possible the EEOC employees' response was based on incomplete facts or even on a completely hypothetical situation posed by Nguyen.

The EEOC's response, as reported by Nguyen, was not wrong. At most, it was ambiguous. The EEOC allegedly told her that her lawsuit must be filed "90 days after I received it [the right-to-sue notice]" If "received" encompasses constructive receipt by a designated agent, then the EEOC's response was correct. Thus, there is no probative evidence that Nguyen was misled by the EEOC or anyone else.[7] *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150-152 (1984) (Complainant's "diligent efforts" not enough to invoke equitable tolling where no showing that motion for appointment of counsel was pending or of affirmative misconduct by the defendant that lulled the plaintiff into inaction). The court of appeals rightly concluded that her equitable tolling claim did not have merit.

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7. Even assuming that Nguyen was misled by the EEOC employees — and there is absolutely no evidence that she was — we submit that she had no right to rely on that informal advice, which was not based on any published regulation. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 703 n.13 (1989). *See Robinson v. Dalton*, 107 F.3d 1018, 1023-24 (3d Cir. 1997) (single telephone call to EEOC counselor insufficient for equitable tolling where complainant failed to confirm telephonic advice by written communication).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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